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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

NO._____

SMITTY BAKER COAL COMPANY, INC.
AND RALPH BAKER,

Petitioners,

v.

THE FEDERAL MINE SAFETY AND
HEALTH REVIEW COMMISSION,

Respondent

and

GLEN MUNSEY,

Intervenor-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
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TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE
AND ASSOCIATE JUSTICES OF THE SUPREME
COURT OF THE UNITED STATES:

PETITIONERS, SMITTY BAKER COAL COMPANY, INC. AND RALPH BAKER, RESPECTFULLY PRAY THAT A WRIT OF CERTIORARI ISSUE TO REVIEW THE JUDGMENT AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT IN THIS CASE

QUESTIONS PRESENTED FOR REVIEW

1. Can attorneys fees and costs be allowed in a discriminatory discharge action under the Federal Coal Mine Health and Safety Act, 30 U.S.C. §820(b) (1969) where the record and stipulation of counsel conclusively show that none were "incurred" as expressly required by said Act?

2. Can attorneys fees be allowed in a discriminatory discharge action under the Federal Coal Mine Health and Safety Act, 30 U.S.C. §820(b) (1969) for representation provided by salaried union staff counsel with no expectation of payment for services?

3. Can attorneys fees be allowed in a discriminatory discharge action under the Federal Coal Mine Health and Safety Act, 30 U.S.C. §820(b) (1969) where no contemporaneous or probative attorney time records are filed?

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OPINION BELOW

The Per Curiam Opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto.

JURISDICTION

The judgment and opinion of the Court of Appeals was entered on March 11, 1983. A timely petition for rehearing or, alternatively, suggestion for rehearing en banc was denied on May 6, 1983. This Petition for Certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

United States Code, Title 30:

> §820(b)(3). "Whenever an order is issued under this subsection, at the request of the applicant, a sum equal to the aggregate amount of all costs and expenses (including the attorney's fees) as determined by the Secretary to have been reasonably incurred by the applicant for, or in connection with, the institution and prosecution of such proceedings, shall be assessed against the person committing such violation."

STATEMENT OF THE CASE

This is an action for discriminatory refusal to rehire a coal miner after a voluntary quit. The action was commenced in 1971 under The Federal Coal Mine Health and Safety Act, 30 U.S.C. §820(b) (1969) by intervenor-respondent Glen Munsey. The case has had a tortuous history including two previous appeals to the Court of Appeals. See Munsey v. Morton, 507 F.2d 1202 (1974) and Munsey v. Federal Mine Safety & Health Review Commission, 595 F.2d 735 (1978). The intervenor-respondent Munsey has been for the most part unsuccessful. During some twelve years of litigation he has been found entitled to $2,858.26 in back pay for petitioner's discriminatory refusal to rehire him after he voluntarily quit his employment.

During the period 1971-1976, Munsey was represented by staff counsel for his union, the United Mine Workers of America. From 1977 to the present he has been represented by the same attorney who is now in private practice.

In the proceedings below, the United Mine Workers of America did not appear or intervene seeking the allowance or reimbursement of attorney's fees or expenses. The former union staff counsel, Mr. Steven B. Jacobson, Esq. did request attorney's fees and expenses be awarded in the amount of some $109,000.00. In support of the request, he filed an unauthenticated summary, by year, of estimated time spent on the matter and suggested hourly rates to be utilized in computing the fee allowance. Objection was made by petitioners because of the lack of authentication, the absence of time records and other probative supporting materials, contemporaneous or otherwise. Petitioners' objection below was overruled subject to Munsey's counsel filing such supporting records and materials upon which the estimated time summary was based. Subsequently, the summary of estimated time was authenticated and filed. No time records or other probative supporting materials were ever filed.

At the hearing below, Munsey's counsel stipulated on the record that "Mr. Munsey has never been charged for expenses, and is not expected to pay back any fees".

The Commission's Administrative Law Judge found that attorney's fees were not allowable for the period prior to 1977 when Munsey was represented by union staff counsel. For the period after 1977, when Munsey's counsel had left his union employment and entered private practice, the ALJ awarded $26,462.50 in attorney's fees. This award was based upon the then authenticated summary of estimated time. As found by the ALJ, "Counsel did not state whether the hours claimed were established by daily records, by reconstruction through close examination of the record of the case or by mere estimation". Despite the absence of probative records which would permit anyone to determine the reasonableness of the hours claimed, the ALJ held that the burden of justifying any deviation from the amount awarded "rests with the party proposing the deviation" - namely petitioners.

The ALJ also refused to consider any adjustment in the fee award based upon the mostly unsuccessful results of Munsey's counsel to obtain more than a nominal back pay award. He reasoned that Munsey's personal right and the rights of all miners as a class to be free of unlawful, safety-related discrimination had been vindicated.

The Court of Appeals, per curiam, upheld the ALJ in all respects save the finding that Munsey could not be awarded any costs or attorney fees for the period during which he received free representation of staff counsel of his union. Based upon the representation of Munsey's counsel at oral argument that he and the union had agreed to allow him to collect the full fee without reimbursement of the union's expenses, the Court of Appeals remanded to allow counsel to be directly awarded fees for the period prior to 1977.

Hence, at this point, Munsey has recovered $2,858.26 in back pay. Additionally, despite the fact that he has incurred no direct or contingent obligation to pay attorney's fees and expenses and despite

the fact that no probative attorney time records or materials have been furnished, he has been awarded $26,462.50 in attorney's fees and the case remanded for a further award of attorney's fees during the period when his counsel was a salaried union staff attorney.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With The Express Requirement Of The Act That Attorney's Fees Be "Incurred".

The intervenor-respondent Munsey, as a successful applicant below, is entitled to have petitioners assessed with "a sum equal to the aggregate amount of all costs and expenses (including the attorney's fees) as determined by the Secretary to have been reasonable incurred by the applicant . . ." 30 U.S.C. §820(b)(3) (1969). The Act clearly and expressly permits the recovery of only fees and expenses reasonably incurred by an applicant. These words must have some meaning. They cannot be simply

ignored. The most obvious and reasonable interpretation is that Congress contemplated payment or the undertaking of an obligation to pay by an applicant as a prerequisite to recovery.

The record in this case, as cited to the Court of Appeals, absolutely and irrefutably shows that Munsey incurred no attorney's fees, costs or expenses in this case. Munsey expressly testified that he never even retained counsel. There was no pro bono agreement here. He was represented by salaried staff counsel of his union. That union has made no request for reimbursement of any legal fees or expenses. When Munsey's staff counsel left the union, he continued to appear in these proceedings. It is stipulated in the record that no payment was expected by him from Munsey.

It is respectfully suggested that the Court of Appeals erroneously failed to consider and apply the plain express language of the Act when it allowed attorney's fees under these circumstances. Only this Court can correct that error.

2. The Decision Below Conflicts With Prior Decisions Of The Court Of Appeals As To Attorney's Fee Allowances For Services Rendered By Salaried Union Staff Counsel And Presents An Important Case Of First Impression.

In extending to Munsey the right to recover attorney's fees for his representation by salaried union staff counsel, the Court of Appeals relied upon Nat'l Treasury Employees Union v. U.S. Dep't of The Treasury, 656 F.2d 848 (1981). That case involved claims made by a union for services rendered pursuant to the union's prepaid legal services plan in a suit under the Privacy Act of 1974. There it was recognized that even under otherwise appropriate circumstances, a union could only recoup the expenses it incurred in supplying services to the client; above-cost fees to the union itself being inappropriate. That decision was expressly limited to the facts of that case. 656 F.2d at 855.

Here no prepaid legal services plan is involved. The union seeks no fees or expenses. No

pro bono representation agreement was made. Munsey's counsel was paid a handsome salary during his tenure with the union while prosecuting this case. He was never employed or retained by Munsey.

Despite the prior holding in Nat'l Treasury and the completely dissimilar facts of this case, the Court of Appeals held that the union would be entitled to costs and attorney fees for representation of union member Munsey. It also held, based on representations by Munsey's counsel at oral argument that he and the union had agreed that counsel could collect the full fee without reimbursing the union, that above-cost (market value) fees could be recovered since they were to be awarded to the attorney alone (and not for the union's general treasury). Such representation by counsel was completely outside the record in the case. Indeed, no evidence or similar representation had been made below. Petitioner's had no opportunity to corrobrate or conduct examination regarding any arrangement between the union and counsel.

It is respectfully submitted that such representations as to substantive matters outside the record are completely inappropriate in appellate practice. However, when such representations, then are used to form the basis for the opinion of the Court of Appeals, a complete miscarriage of justice occurs.

The opinion of the Court of Appeals conflicts with the previous decision in Nat'l Treasury and also erroneously is based upon matters outside the record in the case. Hopt v. Utah, 114 U.S. 488; Adickes v. Kress & Co., 398 U.S. 144, 157-158, N.16. Only this Court can correct such errors.

3. The Decision Below Conflicts With the Decisions Of Other Courts Of Appeals As Well As Those Of The District Of Columbia Circuit.

In Johnson v. Georgia Highway Express, Inc., the Fifth Circuit set criteria to be met by an applicant for an attorney's fee award noting that the applicant "has the burden of proving his entitlement to an award for attorney's fees just as he would bear

the burden of proving a claim for any other money judgment. 488 F.2d 714, 720 (5th Cir. 1974). The Fifth Circuit included in that burden the production of detailed accurate attorney time records.

In Copeland v. Marshall, the D. C. Circuit relied upon and extended Georgia Highway Express noting that in the absence of detailed accurate time records, no judicial body can make a determination of the number of hours reasonably expended by an attorney. 641 F.2d 880, 890-91 (D.C. Cir. 1980).

In National Association of Concerned Veterans v. Secretary of Defense, the D. C. Circuit laboriously established definitive standards and requirements for awarding prevailing party attorneys fees. Specifically, the Court noted certain threshold criteria, to wit:

1. Conclusory "information and belief" affidavits presenting prevailing community hourly rates will not suffice;

2. Evidence of counsel's actual billing practices and rates should be submitted;

3. Casual after-the-fact estimates of time expended are insufficient to support an award. Rather, contemporaneous, complete and standardized time records must be presented;

4. Broad summaries of work done and hours logged are insufficient;

5. Nonproductive or unsuccessfully spent time should be excluded with such time detailed in the application. 675 F.2d 1319, 1325-28 (D.C. Cir. 1982).

No contemporaneous, complete, detailed or actual time records were submitted in this case despite the objection by petitioner's counsel to their absence. The only documentation purportedly supporting an attorney's fee award in this case is a broad, conclusory, unsupported summary of counsel's time as he estimates it over the twelve-year history of this case.

The record in this case is devoid of probative evidence to support an award of attorney's

fees and expenses. Further there is no evidence as to time and expenses devoted to the many unsuccessful issues in this case.

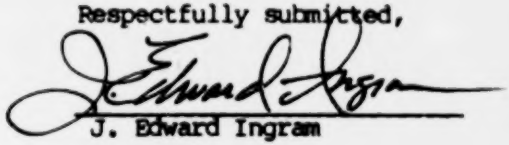
These deficiencies and conflicts with prior decisions were called to the attention of the Court of Appeals twice. Nevertheless, they were ignored. These conflicts justify the grant of certiorari to review the judgment below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

August 4, 1983



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APPENDIX

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1079

GLEN MUNSEY, PETITIONER

v.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION, RESPONDENT

No. 82-1084

SMITTY BAKER COAL COMPANY, INC. and RALPH BAKER, PETITIONERS

v.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION, RESPONDENT

GLEN MUNSEY, INTERVENOR

Petitions for Review of an Order of the Federal Mine Safety and Health Review Commission

---

Argued February 4, 1983

Decided March 11, 1983

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Steven B. Jacobson for Glenn Munsey, petitioner in No. 82-1079 and intervenor in No. 82-1084.

J. Edward Ingram for Smitty Baker Coal Company, Inc. *et al.*, petitioners in No. 82-1084.

James A. Lastowka, General Counsel, Federal Mine Safety and Health Review Commission, was on the statement in lieu of brief for respondent. *Palma R. Vanni*, Attorney, Federal Mine Safety and Health Review Commission, entered an appearance for respondent.

Before WRIGHT and BORK, *Circuit Judges*, and MCGOWAN, *Senior Circuit Judge*.

Opinion for the court *per curiam*.

PER CURIAM: This case has twice before been heard by this court. *See Munsey v. Morton*, 507 F.2d 1202 (D.C. Cir. 1974); *Munsey v. Federal Mine Safety & Health Review Comm'n*, 595 F.2d 735 (D.C. Cir. 1978). The opinions issued on those prior occasions fully set forth the factual background of this case and underscore the urgent need to bring this litigation to an end.

This court, with one exception noted below, upholds the determinations of the Federal Mine Safety and Health Review Commission, generally for the reasons set forth in the findings of the Administrative Law Judge adopted by the Commission. *See* 3 Joint Appendix (JA) 1665-1682, 1716.

We reverse the determination of the Commission that petitioner Munsey cannot be awarded *any* costs or attorney fees for the period during which he received free representation by staff counsel of his union. The ALJ recognized that under the Federal Coal Mine Health and Safety Act, 30 U.S.C. § 820(b)(2) (1976), successful petitioners are entitled to recover their attorney fees and that under such authority fees have been awarded to attorneys in private practice, private legal services organizations, and public interest law firms. However, he saw nothing "to justify the extension of the right to recover fees or ex-

penses under such circumstances to unions or collective bargaining agents." 3 JA at 1679.

The ALJ is incorrect. This circuit has recognized that unions and union attorneys are entitled to costs and attorney fees for representation of union members. *Nat'l Treasury Employees Union v. U.S. Dep't of the Treasury*, 656 F.2d 848 (D.C. Cir. 1981). If attorney fees are awarded to the union itself rather than its attorney, the union can only recoup the expenses it incurred in supplying services to the client; above-cost fees to the union itself would be inappropriate. *Id.* at 853. If attorney fees are awarded to the attorney alone (and not for the union's general treasury), the attorney is entitled to receive the market value of the services rendered. The mere fact that an attorney is a salaried employee of the union should not affect the size of the fee to which he is entitled. *Id.* at 850. "Reasonableness, in terms of market value of the services rendered, is the sole limit on fee awards to organizationally-hired lawyers when the fees are to be paid to the lawyers alone." *Id.* at 852-853.

On remand, the Commission should determine the amount to be awarded in accordance with the standards set forth in *Nat'l Treasury Employees Union v. U.S. Dep't of the Treasury, supra.*[1]

Affirmed in part and reversed and remanded in part.

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[1] We note that in past cases we have required salaried attorneys recovering the market value of their services from defendants to reimburse their employers for the kinds of expenses the employers incurred that would normally be included in an attorney's fee, including the salaries of the lawyers and their adjunct staff. *See Wilderness Society v. Morton*, 495 F.2d 1026, 1037 (D.C. Cir. 1974) (*en banc*), *rev'd on other grounds sub nom. Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). In this case, however, Munsey's attorney represented at oral argument that he and the union had agreed to allow him to collect the full fee without reimbursement of the union's expenses. On the strength of this representation, we direct that all fees go to the attorney himself.

United States Court of Appeals

FOR THE [illegible]

No. 82-1084 September Term, 19 82

Smitty Baker Coal Company, Inc.,
and
Ralph Baker,
Petitioners

v.

The Federal Mine Safety and
Health Review Commission,
Respondent

Alan Munsey,
Intervenor

And consolidated case No. 82-1071

ARGUED 2-4-83

United States Court of Appeals
for the District of Columbia Circuit

FILED MAY 6 1983

GEORGE A. FISHER
CLERK

BEFORE: Wright and Bork, Circuit Judges, and [illegible], Senior Circuit Judge

ORDER

On consideration of petitioners' petition for rehearing, filed April 22, 1983, it is

ORDERED by the Court that the aforesaid petition is denied.

[illegible]

No. 82-1084

Sept. Term, 19 82

Smitty Baker Coal Company, Inc.,
and
Ralph Baker,
Petitioners

v.

The Federal Mine Safety and
Health Review Commission,
Respondent

Glen Munsey,
Intervenor

And consolidated case No. 82-1079

ARGUED 2-4-83

United States Court of Appeals
for the District of Columbia Circuit

FILED MAY 6 1983

GEORGE A. FISHER
CLERK

BEFORE: [illegible]

O R D E R

Petitioners' suggestion for rehearing en banc has been circulated to the full Court and no member of the Court has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court that the aforesaid suggestion is denied.

Per Curiam

FOR THE COURT: